

SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

2011 SEP 22 AM 10:51

SALDRA K HARKHAM, CLERK  
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9  
10 **IN THE SUPERIOR COURT**

11 **STATE OF ARIZONA, COUNTY OF YAVAPAI**

12 STATE OF ARIZONA,

V1300CR201080049

13 Plaintiff,

14 STATE'S OBJECTION TO DEFENDANT'S  
15 MOTION FOR CONTINUANCE OF  
16 PRESENTENCE HEARING AND  
17 SENTENCING

18 vs.

19 JAMES ARTHUR RAY,

20 Defendant.

(The Honorable Warren Darrow)

21  
22 The State of Arizona, by and through Sheila Polk, Yavapai County Attorney, respectfully  
23 requests this Court to deny Defendant's Motion for Continuance of Presentencing Hearing and  
24 Sentencing. Defendant argues that the law "compels this Court to make reasonable  
25 accommodations to permit Mr. Kelly to continue to represent Mr. Ray at the critical stage of  
26 sentencing." *Defendant's Motion for Continuance of Presentencing Hearing and Sentencing*,  
*page 1, lines 14-15*. As explained below, the cases cited by Defendant do not compel this Court  
to grant the continuance; the facts of the cases cited by Defendant are distinguishable from the  
case at bar; the holdings in several of the cases support the denial of a continuance; and a careful  
balancing of the relevant factors support a denial of the request. Moreover, the Court has already

1 provided reasonable accommodation by continuing the pre-sentence hearing and sentencing  
2 from September 19 to September 28, 2011.

### 3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 The Sixth Amendment right to counsel is not absolute. The cornerstone of this right is the  
5 relationship between a defendant and his attorney, the ability of the attorney to competently  
6 represent the defendant, and a reasonable opportunity for a defendant to consult with his  
7 counsel.<sup>1</sup> Whether the denial of a defendant's request to continue a trial is a violation of the  
8 Sixth Amendment or violates due process is a fact-specific inquiry. Case law instructs that the  
9 right to counsel of choice in the context of a defendant's request for continuance must be  
10 carefully balanced against other factors, including the public's interest in the orderly  
11 administration of justice. Another factor which must be given great weight are the constitutional  
12 rights of the victims to a speedy disposition of the case as set forth in the Arizona Constitution,  
13 Article II, section 2.1.  
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15

16 It is also true that a trial court, acting in the name of calendar control, cannot  
17 arbitrarily and unreasonably interfere with a client's right to be represented by the  
18 attorney he has selected. On the other hand, the right to counsel of choice may not  
be used to unreasonably delay trial.

19 When a defendant's chosen counsel represents that he cannot meet a set trial date  
20 and requests a continuance, a trial court considering such a request must be  
21 sensitive to the defendant's right to counsel of his choice, as well as the public's  
22 interest in prompt and efficient administration of justice. If the court finds that the  
delay is an attempt to manipulate a trial, or causes prejudice to the prosecution, or  
creates difficulties for the trial court, the trial court may interfere with the

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23 <sup>1</sup> "The right to choose one's own counsel is an essential component of the Sixth Amendment  
24 because, were a defendant not provided the opportunity to select his own counsel at his own  
25 expense, substantial risk would arise that the basic trust between counsel and client, which is a  
26 cornerstone of the adversary system, would be undercut." *Linton v. Perini*, 656 F.2d 207, 209  
(6th Cir. 1981).

1 defendant's right to counsel of his own choice and require the case to proceed. On  
2 the other hand, where the request is reasonable, where there have been no prior  
3 adjournments, where the length of delay is moderate, and where the adjournment  
4 seems to be for legitimate reasons, the court should allow a reasonable  
5 adjournment to permit a defendant to have retained counsel of his own choice.

6 This does not mean that a trial court cannot tightly control its own docket, or that  
7 its assignment of cases can be manipulated by defense counsel and defendants. A  
8 court must always keep control of its own docket, but in doing so it must be  
9 reasonable and consider the constitutional right of a defendant to have retained  
10 counsel of his choice.

11 *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981).

12 **I. Federal and State cases direct the Court to examine the request under seven  
13 relevant factors.**

14 Both state and federal cases provide ample guidance to this Court on this issue. In  
15 Arizona, the leading case is *State v. Hein*, 138 Ariz. 360, 674 P.2d 1358, 1368 (Ariz. 1983),  
16 wherein the Arizona Supreme Court held that the Sixth Amendment does not entitle a defendant  
17 to the representation by a particular attorney from a retained law firm. "[W]e note that  
18 employment of one member of a law firm is employment of the firm, unless there is a special  
19 understanding to the contrary. Thus, under a contract without such a special understanding, any  
20 member of the firm may attend to the business entrusted to the firm, and the client does not have  
21 the right to demand that any particular member of the firm conduct the litigation." *Id.* at 370,  
22 674 P.2d at 1368.

23 *Hein* holds that whether to grant or deny a motion to continue is within the sound  
24 discretion of the trial judge and will not be overturned absent a clear abuse of that discretion. *Id.*  
25 at 368, 674 P.2d at 1367. "It is axiomatic that an accused enjoys the right to assistance of counsel  
26 for his defense. . . . Implicit in this guarantee is the right to be represented by counsel of one's  
choice. . . . It is also axiomatic that a motion for a continuance is directed to the discretion of the

1 trial court, and that court's ruling will not be disturbed absent a clear abuse of discretion. . . . The  
2 trial court is accorded this discretion because it is the only unbiased party in a position to observe  
3 the proceeding. . . . Thus, the trial court is the only party in a position to judge the  
4 inconvenience of a continuance to the litigants, counsel, witnesses, and the court, and further is  
5 the only party in a position to determine whether there are 'extraordinary circumstances'  
6 warranting a continuance and whether 'delay is indispensable to the interests of justice.' 17  
7 A.R.S. Rules of Criminal Procedure, rule 8.5(b)." *Hein*, 138 Ariz. 360, 369, 674 P.2d 1358.  
8  
9 (*citations omitted*)

10 *Hein* notes that whether to grant or deny a request for continuance is a fact-specific  
11 inquiry, citing *United States v. Burton*, 584 F.2d 485, 490-91 (CA D.C.1978). Those factors  
12 include: (1) whether other continuances were granted; (2) whether the defendant had other  
13 competent counsel prepared to try the case; (3) the convenience or inconvenience to the litigants,  
14 counsel, witnesses, and the court; (4) the length of the requested delay; (5) the complexity of the  
15 case; and (6) whether the requested delay was for legitimate reasons or was merely dilatory.  
16 *Hein*, 138 Ariz. at 368, 674 P.2d at 1367.

17  
18 At the federal level, *United States v. Burton*, *supra*, 584 F.2d 485 (C.A.D.C. 1978), is the  
19 seminal case and emphasizes that the right to counsel of one's own choice is not without  
20 restriction. "Yet the right to retain counsel of one's own choice is not absolute. The right 'cannot  
21 be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and  
22 deprive such courts of the exercise of their inherent powers to control the same.' The public has  
23 a strong interest in the prompt, effective, and efficient administration of justice; the public's  
24 interest in the dispensation of justice that is not unreasonably delayed has great force." *Id.* at 489.  
25  
26

1 The *Burton* case elaborates on the factors noted in Hein above. "What is a reasonable  
2 delay necessarily depends on all the surrounding facts and circumstances. Some of the factors to  
3 be considered in the balance include: the length of the requested delay; whether other  
4 continuances have been requested and granted; the balanced convenience or inconvenience to  
5 the litigants, witnesses, counsel and the court; whether the requested delay is for legitimate  
6 reasons, or whether it is dilatory, purposeful or contrived; whether the defendant contributed to  
7 the circumstance which gives rise to the request for a continuance; **whether defendant has**  
8 **other competent counsel prepared to try the case, including the consideration of whether**  
9 **other counsel was retained as lead or associate counsel;** whether denying the continuance will  
10 result in an identifiable prejudice to defendant's case, and if so, whether this prejudice is of a  
11 material or substantial nature; the complexity of the case; and other relevant factors which may  
12 appear in the context of any particular case." *Burton, supra*, 584 F.2d at 490-491. (emphasis  
13 added).  
14  
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16 In analyzing the facts of this case under the *Hein* and *Burton* approach, it is clear this  
17 Court should deny any further continuance of the sentencing.

18 **(1) Whether other continuances were requested and granted.**

- 19 • On June 22, 2011, the jury found Defendant guilty of three counts of negligent homicide  
20 for the deaths of Kirby Brown, Lizbeth Neuman and James Shore.
- 21 • On June 30, 2009, the jury verdict returned a verdict on the aggravating factors.
- 22 • At the conclusion of the aggravation hearing, sentencing was set for July 25, 2011.
- 23 • On July 11, 2011, Defendant moved to vacate the sentencing date and set the matter for a  
24 scheduling conference. This Court granted Defendant's motion and a scheduling  
25 conference was held July 29, 2011.
- 26

- 1 • The Court will recall that Defense Counsel informed the Court at the scheduling  
2 conference that they needed three hours to argue their Motion for New Trial. The Court  
3 granted that request, noted it would give equal time to the State and accordingly set oral  
4 argument for August 16, 2011. The Court will further recall that on August 16, 2011, at  
5 oral argument on Defendant's Motion for New Trial, defense counsel informed the Court  
6 they did not need oral argument and were submitting the matter on their pleadings.  
7
- 8 • At the hearing on July 29, 2011, Defense Counsel also requested that the presentence  
9 hearing be set in September to accommodate Mr. Li's vacation from August 19 through  
10 August 30, 2011. The State objected to Defendant's request and urged this Court to set  
11 the presentence hearing and sentencing in August.
- 12 • This Court granted Defendant's request and set the presentence hearing to occur over five  
13 days starting on September 19, 2011 and continuing through September 23<sup>rd</sup>, 2011.  
14 Sentencing was set for September 26, 2011 at 2:30 p.m.
- 15 • On September 6, 2011, Defendant filed a "Motion to Vacate Mitigation Hearing." This  
16 motion was denied on September 8, 2011.
- 17 • On September 18, 2011, defense counsel Tom Kelly fell ill and this Court granted a  
18 continuance of the hearing set to begin on September 19, 2011.
- 19 • This Court then rescheduled the presentence hearing to commence on September 28,  
20 2009.

21 **(2) Whether Defendant has other competent counsel prepared to try the case, including**  
22 **the consideration of whether other counsel was retained as lead or associate counsel.**

- 23 • As this Court correctly noted, Defendant has been represented in the courtroom by four  
24 competent attorneys throughout the months of this trial.
- 25 • Defense counsel has reminded the Court on several occasions that there are additional  
26 attorneys at the firm in Los Angeles who have performed legal services in this case.
- Of the State's listed seven witnesses, defense counsel Truc Do and Luis Li have  
interviewed or were present during the defense interviews of two: Detective Ross Diskin  
and Steve Pace, the State's expert on how to safely conduct adventure learning programs.
- Of the State's remaining five witnesses, one is a victim and the other four have not been  
interviewed (to the State's knowledge) by anyone from the defense team.
- This Court respected the Defendant's request that the sentencing not be set during the last  
two weeks in August to accommodate the vacation schedule of Mr. Li so he could be

1 present at the hearing. At that time, Defendant did not inform this Court, as he now does  
2 in the motion, that "the Defense decided at the outset of this case that, if a sentencing  
3 proceeding were necessary, Mr. Kelly would handle the sentencing proceeding and  
related work." *Defendant's Motion*, p. 4. lines 24-25.

4 **(3) The convenience or inconvenience to the litigants, counsel, witnesses, and the court.**

- 5 • As indicated in factor #1 above, the delay between the verdict and the sentencing is now  
6 almost three months.
- 7 • October 9, 2011, will mark the two-year anniversary of the deaths of the three victims  
8 due to the criminal negligence of Defendant. The Court should consider the victims, their  
rights and the significance of this date in weighing the request to continue.

9 **(4) The length of the requested delay.**

- 10 • Defendant argues that the date of September 28 "will effectively rule that Mr. Kelly  
11 cannot continue to represent Mr. Ray." *Defendant's Motion*, p. 5, lines 14-15. This  
12 statement belies the fact that Mr. Kelly fell ill the day before the hearing was set to begin  
13 and was presumably prepared to proceed. The release to work by his doctor of September  
26 is two days before the rescheduled hearing will resume, effectively giving Mr. Kelly  
14 additional time to prepare.
- 15 • Defendant notes as an additional reason for the delay that "proceeding with the schedule  
16 proposed in the Court's recent Order would prevent Mr. Ray from calling several key  
17 mitigation witnesses who state they have conflicts with the new proposed dates." *Defendant's Motion*, p. 5, lines 8-10. The convenience of witnesses should not be a  
reason for a continuance as the parties have subpoena authority.

18 **(5) The complexity of the case**

19 Sentencing in this matter is not complex and should proceed forthwith.

20 **(6) Whether the requested delay was for legitimate reasons or was merely dilatory.**

21 The State does not question the legitimate illness of Mr. Kelly.

22 **(7) Whether denying the continuance will result in an identifiable prejudice to**  
23 **defendant's case, and if so, whether this prejudice is of a material or substantial nature.**

1 Defendant does not provide information to establish material or substantial prejudice to  
2 his case. In fact, as noted above, Defendant has competent counsel who can proceed with the  
3 sentencing hearing.

4 **II. Cases cited by Defendant are inapposite to the case at bar.**

5 Defendant's reliance on *State v. Aragon*, 221 Ariz. 88, 210 P.3d 1259 (App. 2009), is  
6 misplaced as the case is distinguishable on many grounds. *Aragon* involved a request by a  
7 defendant for a continuance so he could substitute private counsel, not a request for a  
8 continuance because one of five privately retained attorneys who have noticed their appearance  
9 on the case is sick, as in the case at bar. *Aragon* involved two counts of aggravated DUI and was  
10 not a victim case. The case did not involve any discussion of victims' rights and, as noted by the  
11 court, a continuance would have inconvenienced only law enforcement personnel "who routinely  
12 juggle their calendars to accommodate court appearances." *Id.* at 90, 210 P.3d at 1261. Perhaps  
13 most important, the trial court was found to have abused its discretion in denying a continuance  
14 erroneously based on his strict adherence to Rule 8, a rule designed to protect the defendant's  
15 rights. *Id.* at 91, 210 P.3d at 1262.

16 Similarly, Defendant's attention on *People v. Crovedi*, 65 Cal.2d 199, 417 P.2d 868, 53  
17 Cal.Rptr. 284 (1966), is without merit. Defendant Crovedi had retained an experienced defense  
18 attorney to represent him. Four days after trial commenced, the attorney suffered a heart attack.  
19 Upon learning that the attorney would not be able to return to the courtroom for approximately  
20 two months, the trial court appointed his law partner to represent the defendant "over the  
21 vigorous protest" of both the defendant and the law partner. *Id.* at 203. The new attorney had not  
22 been on the case and represented to the court that he was inadequately prepared to proceed to  
23  
24  
25  
26



1 trial. *Crovedi* is clearly distinguished from the case at bar wherein four defense attorneys have  
2 been vigorously represented Defendant in the courtroom for many months. *Corvedi* also makes  
3 no reference to any consideration of the constitutional rights of the victims, an important factor  
4 under the Arizona Constitution, Article II, section 2.1.

5  
6 **III. Defendant's reliance on Arizona Supreme Court Rule 38 is unfounded.**

7 Defendant advocates an erroneous reading of Arizona Supreme Court Rule 38 to garner  
8 support for his request. In fact, the very passage highlighted by Defendant, suggesting that  
9 attendance in court by a local attorney is mandatory, makes it clear that requiring local counsel  
10 to appear in court is discretionary.

11 **CONCLUSION**

12 The State urges this Court to deny Defendant's request for all the reasons set forth above.

13 RESPECTFULLY submitted this 22<sup>nd</sup> day of September, 2011.

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17   
18 SHEILA SULLIVAN POLK  
19 YAVAPAI COUNTY ATTORNEY

20  
21 **COPIES** of the foregoing **emailed**  
22 this 22<sup>nd</sup> day of September, 2011:

23 Hon. Warren Darrow  
24 Dtroxell@courts.az.gov

25 **COPIES** of the foregoing delivered/mailed  
26 this 22<sup>nd</sup> day of September, 2011, to:

Thomas Kelly  
Via courthouse mailbox

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